APPEAL NO. 93176

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was originally scheduled for November 3, 1992, but was continued and reconvened on November 20, December 7, 1992, and January 21, 1993. The hearing itself was held on February 8th, in (city), Texas, (hearing officer) presiding. The appellant, hereinafter claimant, appeals the hearing officer's determination that the claimant did not sustain an on-the-job injury on (date of injury), and that he did not timely notify his employer of an injury. The respondent, hereinafter carrier, points out that issues of injury and notice are factual in nature, and argues that the evidence in the case supports the hearing officer's decision.

DECISION

Upon review of the record, we affirm the hearing officer's decision and order.

The claimant, who was employed by temporary labor supplier (employer) as a sheet metal laborer, had been sent on August 15, 1991, to work on a job at a construction project for a client company. The company, (TDM), was providing air conditioning and plumbing construction services to the general contractor on the project. About two months after he was hired, the claimant took off work to enter the hospital for removal of a tumor and cyst, although he stated that for some reason the operation was never performed and he returned to work on November 20th. He testified that on November 27th he had been sent to the basement of the project and instructed to pull buckets of sand and mud out of a pump shaft. He stated that as he lifted a bucket it remained stuck, and he let go and fell backwards into assorted debris including lumber and metal pipes. A coworker, (Mr. S), came over and claimant told him about his fall.

Mr. S, who at the time of the hearing was working for a different employer, testified that he was the "lead man" as of the day of the accident, and that he observed claimant falling over the trash. (Carrier's witness, employer's executive administrator, denied that Mr. S was hired in any supervisory capacity.) Mr. S said that claimant "fell pretty hard on that lumber," but stated he really did not think claimant was hurt that badly at the time. He said that when he helped him up, claimant said he hurt his back, but that he asked Mr. S not to tell anyone. However, Mr. S said he reported the injury to Mr F, who worked for employer, when he went to pick up the employees' checks; he also said he took the claimant to Mr P and Mr M, who worked for TDM. Mr. S stated the claimant was angry with him because he had mentioned claimant's injury. The claimant testified that at the time he thought his injuries were not serious, and that he was afraid his job would be jeopardized if he said his back was hurt.

The claimant said he went to see (Dr. O) on November 28th, but that Dr. O told him he did not take workers' compensation cases. Dr. O gave him a release to return to work, stating claimant had been under the doctor's care from December 6 to December 15, 1991,

and that he had "flu syndrome." The claimant said he went home to bed for one week after the accident and only went back to employer to pick up his last paycheck. He disagreed with employer's payroll reports showing him working two days his last week, saying that that time only represented the employer's withholding of a week's paycheck from him.

The claimant said that about two months after the accident, his back became so bad he could not walk, and he went to the VA Hospital. He testified that he had an MRI in April and surgeries in April and June 1992. Medical records show the MRI disclosed an HNP at L4-5 or L5-S1. Hospital records show he was admitted on April 24th because of worsening lower back pain and right foot drop; however, a patient history states he had mild lower back pain for several years which became much worse following a motorcycle accident, and says that "2 months ago he awoke after a day of repairing a car and could not get out of bed due to his pain." The claimant and his wife both denied he had had a motorcycle accident. Mr. S, who at times had ridden in the same motorcycle club as claimant, testified that he himself had had an accident, but that to his knowledge claimant had not. The records further show that the claimant underwent a lumbar laminectomy on April 28th. No medical records were offered concerning claimant's June surgery.

(Ms. W), employer's executive administrator, stated that one of her job duties is processing workers' compensation claims, and that she was not aware that the claimant was alleging an on-the-job injury until June 1992, when the carrier contacted her and requested that an employer's first report of injury be completed. She said she contacted employees of employer and TDM who had worked with claimant, except for (Mr. F) whom she was unable to reach. All the people she spoke with denied knowledge of an on-the-job injury, and were unable to find any report of an injury in their records. Signed statements to this effect from Mr P, Mr , and Mr C were made part of the record. She said that a few days after claimant stopped working she had questioned Mr. F about claimant's whereabouts; she said they were both under the impression that claimant had health problems due to his tumor.

Ms. W said she also contacted Dr. O's office and was told they had treated the claimant for a sore throat and fever and were unaware of a back injury. She also said Mr. F's supervisor had contacted the claimant in March about another job, and set up an interview for him. The claimant acknowledged that he went on the interview but said he did so in order to qualify for food stamps; he said he told the prospective employer about his back problems and was not hired.

In his appeal the claimant contends that Ms. W's testimony (to the effect that the employer had never withheld one weeks' pay) was not truthful, and he maintained that he was injured at work on November 27th and had not been in a motorcycle accident. In a workers' compensation case, the claimant has the burden of proof to establish that he sustained an injury in the course and scope of his employment. Reed v. Aetna Casualty

and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In the discussion section of his decision and order, the hearing officer summarized the lay and medical evidence and concluded that the claimant had not met his burden in this case. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). Where sufficiency of the evidence is challenged, we will reverse the hearing officer's decision only where his findings are so against the great weight and preponderance of the evidence to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1982, writ ref'd n.r.e.).

The claimant in this case testified with respect to an injury occurring on (date of injury), and as to subsequent events thereafter. He also consistently testified that he had not had a motorcycle accident. Conversely, medical records in evidence indicate he was initially seen by a doctor for flu syndrome, and his hospitalization records give a history of back injury from a motorcycle accident. Mr. S, who testified that he observed claimant stumble and fall over debris at work, appeared uncertain as to whether this event was causally connected to the later back surgery. Ms. W in oral testimony, and other coworkers in signed statements, indicated no knowledge of an on-the-job injury. When faced with such conflicting evidence, the hearing officer was entitled to resolve such conflicts by giving credence to all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1978, no writ). Upon review of the record, we cannot say that the hearing officer's decision was not supported by probative evidence of record.

The claimant additionally contends that the employer withheld information concerning Mr. F, and states that he asked for his Social Security number so that he could be called to testify. We observe that claimant (and his wife, on one occasion) were advised by the hearing officer on earlier hearing dates concerning subpoenas and written statements, and they were additionally advised to contact the Commission's ombudsman for assistance. While the record shows claimant said he was having difficulty contacting Mr. F at his present job, he nevertheless requested a subpoena only for Mr. S. The record further shows that the hearing was continued at least once to allow the claimant a fuller opportunity to have witnesses present. Under these circumstances, we find this point of error to be without merit.

The claimant also contends that the hearing officer said that Mr. S was claimant's brother, and excluded his testimony. Our review of the transcript from the hearing, along with the decision and order, does not indicate this was the case. What the record shows is that the hearing officer stated that Mr. S was a member of the same motorcycle club as claimant and that his testimony was "less than convincing." As noted above, the hearing officer is entitled to weigh the evidence and to judge the credibility of witnesses. We find that he did not exclude or ignore Mr. S's testimony, but rather gave it less weight. This action was not error on the part of the hearing officer.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge